

changing legal landscape. A copy of the proposed House Counsel Rule is attached as Exhibit “1”.¹

DISCUSSION

Currently, there are 22 other states which require that in-house attorneys obtain a form of limited licensure (also sometimes referred to as “registration”) if they have not taken the bar examination or been otherwise admitted to practice in that state.² A 2004 article in the “American Corporate Counsel Association/Law.Com” (which at the time recognized nine states which had in-house counsel requirements) reported that 16 other states were in the process of adopting similar procedures, and the remaining 25 jurisdictions had committees studying the issue. This is not an unexpected response as jurisdictions continue to study and adopt the ABA’s new Model Rule of Professional Conduct 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law).³ It tracks, in

¹ Exhibit “1” contains the proposed rule in both the current and the pending AOC re-numbered/reformatted versions.

² The 22 states that have adopted a form of an in-house counsel rule are: California, Colorado, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Virginia and Washington. See Exhibit “2” for a June 2005 chart prepared by the ABA Center for a Professional Responsibility Joint Committee on Lawyer Regulation [Referencing] In-House Corporate Counsel Rules. Delaware’s Supreme Court recently approved an in-house counsel rule on September 13, 2005 (effective December 2005), after the ABA’s chart was prepared. A copy of the Delaware order is also attached at Exhibit “2”. A minority of states have expressly concluded that in-house counsel practice does not constitute the practice of law as those jurisdictions define it. See, for example, Alabama or North Carolina. Others, like Utah or Alaska, however, which have not enacted a house counsel rule to date, rely on admission by motion – where reciprocity is recognized – or expect the in-house lawyer to otherwise become admitted and licensed to practice with the jurisdiction.

³ Utah Rule of Professional Conduct Rule 5.5 permits some categories of the practice of law under some circumstances by non-Utah licensed lawyers. Subsection (d)(1) provides that, “a lawyer admitted in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may provide legal services in this jurisdiction that: are provided to the lawyers employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission” Comment [17] accompanying this subsection states, “If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the

fact, what has occurred in Utah as the Bar and the Court's Advisory Committee on the Utah Rules of Professional Conduct continued to evaluate the changes in professional conduct rules via the ABA's Ethics 2000 major overhaul. When Utah began studying the ABA's Model Rule 5.5 in 2003, the Bar's MJP and Admissions Committees concurrently begin their study of a house counsel rule.

For those jurisdictions that consider at least some of the conduct of an in-house counsel may well constitute the practice of law in that state, the appeal of a limited license is evident. Obtaining the limited license through an enhanced registration and licensing process is less onerous than taking a bar examination and it clarifies any legal ambiguity related to the in-house counsel's attorney status. A limited license admission rule makes it clear what an out-of-state licensed attorney is authorized to do in a particular state. Finally, it enables a bar association to gain a handle on what types of conduct the general counsel may be engaged in, which promotes uniformity and consistency when unauthorized practice of law issues arise.

There are benefits to enacting a House Counsel Rule for the unlicensed Utah practitioner as well. First and foremost, it clearly authorizes an in-house counsel to advise its employer organization and its employees on pertinent aspects of Utah law. It also clearly authorizes the lawyer to work with opposing counsel on issues which may involve Utah law. The proposed rule also provides an easily accessible source for information about what the in-house counsel is

purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education." For those jurisdictions adopting the ABA's Model Rule of Professional Conduct 5.5, it is pursuant to Comment [17] that they have enacted a rule with additional registration or

permitted to do, which is not the current case. Moreover it avoids problematic future scenarios when changing jobs or locations. For instance, if the in-house counsel who is licensed elsewhere fails to obtain full licensure in the state where he or she works, when the attorney assumes a new job in a state that requires licensing or tries to go into private practice, the new resident jurisdiction may consider that attorney was formerly engaged in the unauthorized practice of law. An example of the potential problem is illustrative: A Utah based in-house counsel is promoted to the company's new position in a New Hampshire subsidiary. Because the attorney had not been licensed in Utah, the New Hampshire Bar, which requires limited admission for in-house lawyers, could deny the attorney the ability to practice within its borders, concluding that the lawyer had violated ethical rules governing the practice of law. A copy of a recent article in the *American Corporate Counsel Association* "Corporate Counsel Guidelines" is attached as Exhibit "4". The article highlights the multijurisdictional nature of in-house corporate law practice and the difficult and largely unanswered questions about the unauthorized practice of law in jurisdictions that have not taken steps to clarify these issues.

A number of factors argue in favor of the Court adopting the proposed House Counsel Rule. Perhaps foremost is the fact that a rule is necessary in order to regulate to some extent these attorneys within our borders. Even without the new protections afforded by new Utah Rule of Professional Conduct 5.5, the Bar is aware that some attorneys have been serving as house counsel

limited licensing requirements. A copy of Utah Rule of Professional Conduct 5.5 is attached as Exhibit "3".

for Utah businesses without obtaining a license here. The Bar's experience is that a significant number of these attorneys do not apply for admission because they do not want to spend the time necessary to prepare for and pass the Bar examination. Furthermore, in recent years house counsels' work, along with the business of corporate clients, has grown increasingly national and global in nature. American society and business is much less defined by geographic borders than in the past. New technology allows lawyers to easily do legal research across state borders and to familiarize themselves with state-specific case law, state codes, and the procedural and administrative rules of other states and to give competent advice to their clients, no matter where those clients are located. But this ability needs to be balanced with some protections.

From a regulatory perspective, a limited license makes sense since a house lawyer is under the scrutiny of a relatively sophisticated employer. An attorney who is employed to represent an organization on an ongoing basis poses less of a risk to the client and the public than an attorney retained by an individual on a one-time basis. Permitting an out-of-state attorney to be licensed under the House Counsel Rule recognizes that the sophisticated client is often in the best position to make an informed choice about which attorney can handle his or her legal work in the most economical and efficient manner. At the same time, the public will be protected under the House Counsel Rule because house counsel applicants will go through the same admissions process as any other applicant, with the Character and Fitness Committee completing a comprehensive review of these attorneys before they are granted a House Counsel license.

Currently, the Bar cannot readily identify the out-of-state attorneys who might be serving as house counsel in Utah. Thus, the Bar is in a poor position to regulate the conduct of these attorneys or instigate disciplinary action if warranted. By eliminating the obstacle of the Bar examination, we believe that out-of-state attorneys serving as house counsel for Utah businesses will be more likely to file an application for admission for a limited license. The application process will enable the Bar to identify the out-of-state attorneys who are operating as house counsel in Utah, and allow the Bar to more readily oversee their professional conduct when necessary. By allowing out-of-state attorneys to be admitted to practice in Utah on a limited basis, the House Counsel Rule allows for better protection of the public than the current scenario where the attorneys serving as house counsel deliberately avoid contact with the Utah Bar. Finally, the Bar has an interest in maintaining an active and vibrant organization. One of the important roles attorneys serve in the state is to volunteer on court and bar committees. Once licensed, house counsel attorneys will be eligible to serve on these committees and hopefully, make significant contributions.

The Bar's MJP and Admissions Committees completed their work and the proposed rule was submitted to the Board of Bar Commissioners (the "Commission") for its October 2005 meeting. The Commission approved the proposed rule on October 7, 2005.

PROPOSED RULE

Under the House Counsel Rule, applicants will be required to submit an application to the Bar's Admissions Office, where their past conduct will be

carefully reviewed. House Counsel attorneys are required to maintain an active license and be in good standing in at least one U.S. jurisdiction. As noted above, the House Counsel Rule places limitations on the attorney's practice. For example, the attorney is not allowed to appear in court and his or her practice is limited to the full-time, legal representation of the business employer. In recognition of the fact that there are non-Utah licensed attorneys currently operating as house counsel in Utah, the House Counsel Rule incorporates a "one-year grace period" in which out-of-state attorneys can file applications and receive house counsel licenses without concern that having engaged in the practice of law in the state will disqualify them for admission. The one-year safe harbor period to file an application is timed from the date the Utah Supreme Court adopts the rule and it becomes effective.

A copy of the proposed House Counsel Rule is attached as Exhibit "1". For consistency purposes, the proposed rule sensibly attempts to mirror the existing admission Rule 5 governing out-of-state licensed attorneys who qualify to be admitted through reciprocity which is the admission on motion process. (A copy of current Rule 5 – Admission on Motion – is attached as Exhibit "5" for comparison purposes.) The more substantive provisions of the proposed rule are summarized below:

Section 20-1. Scope of Practice. This provision contains the much needed description of what the limited practice license permits the house counsel to do. As a practical matter, most in-house counsel attorneys do not appear before courts of records in the normal course of their employment. Those attorneys, however, who need or desire to do so should obtain full licensure through the Bar

since they do not qualify for pro hac vice admission.⁴ The second part of this section clearly restricts the house counsel's legal practice to that of the lawyer's client – the employer; it does not permit the lawyer to engage in outside practice for which in order to do, the individual should become fully licensed in Utah.

Section 20-2. Requirements of House Counsel Applicants. Section 20-2 sets forth the registration requirements for a house counsel limited license. The applicant must establish, in part, by clear and convincing evidence (the same standard applying to other applicants for admission to the Bar) that he or she is licensed to practice and on active status in good standing in another jurisdiction. This requirement helps to insure that the attorney is subject to attorney discipline affecting the attorney's primary license should the case arise. It also helps ensure, just as in the case of out-of-state lawyers applying for reciprocal admission, that the applicant is of good moral character and fit to practice law within our state.

Section 20-4. Unauthorized Practice of Law. Because a number out-of-state licensed attorneys serving as house counsel appear to be unclear on Utah's current requirement that they should be licensed in Utah if they are engaged in the practice of law, this section provides a safe harbor period of one year for those individuals who have not obtained licensure but who practice law here.⁵ It also makes clear that those attorneys who do not seek admission and obtain a

⁴ Rule 11-302 governing pro hac vice admission in Utah state courts prohibits out-of-state licensed attorneys who reside in Utah from using the rule to facilitate practicing their legal practice without first becoming licensed here. The reasoning underlying this prohibition is that to permit such practice would circumvent the requirements to become licensed to practice in Utah.

⁵ As noted above, the period of one year will begin with the effective date of the new rule, if approved by the Court.

license to practice law (whether it is a limited house counsel license or full licensure as a student or attorney or reciprocal applicant) are subject to unauthorized practice of law investigations.⁶ The Bar plans to heavily publicize the proposed rule to maximize the opportunities for lawyers to learn of the new requirements in such places as newspapers throughout the state, the *Bar Journal*, various business magazines, notices to large corporate businesses, appropriate continuing legal education seminars, and other areas. As a matter of equal treatment and principle, however, out-of-state licensed attorneys should be held to a standard of definitively ascertaining whether an approved rule states that a license is required to perform their legal duties within Utah after the one-year grace period expires.

Section 20-5. Continuing Legal Education Requirement. The reasons underlying Utah's current requirement that lawyers who practice law should stay abreast of current developments in the law and continually sharpen their practice skills will apply to house counsel lawyers.

Section 20-6. Application Regulations and Section 20-7. Discipline.

Attorneys who are licensed out-of-state but who live and work in Utah and obtain a limited house counsel license, are expressly subject to the same rules and regulations as other Utah lawyers. Most significantly, house counsel must abide by the Utah Rules of Professional Conduct and are expressly "subject to the same professional discipline in the same manner and to the same extent as a member of the Bar."

⁶ Heretofore, the Bar has been somewhat lenient and has investigated and pursued only the most egregious cases that have come to its attention by the filing of a complaint.

CONCLUSION

The proposed House Counsel Rule affords many benefits to the Bar, the corporate lawyer, the organizational corporate client and the public. It also recognizes the changing legal landscape and accommodates those changes. For these and other reasons discussed above, the Bar requests the Court to approve the proposed admission rule.

Dated this ____ day of November 2005.

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